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IN THE

Supreme Court of the United States

October Term, 1969.

No. ~~947~~. 66

GEORGE A. ROSENBLOOM,

Petitioner,

v.

METROMEDIA, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
A. The Facts	3
B. Proceedings in the District Court	12
C. The Decision of the Court of Appeals	13
SUMMARY OF ARGUMENT	16
ARGUMENT	18
I. The Court of Appeals Correctly Held That, Because WIP's Broadcasts Concerning Petitioner Rosenbloom Involved Matters in Which the Public Had a Legitimate Interest, Those Broadcasts Were Protected by the First Amendment Standards of Proof Developed in New York Times Co. v. Sullivan	18
A. The Rationale Underlying the Rule of New York Times Applies to the Present Case	18
B. Petitioner's Proposed Standard of "Reasonable Care" Is Constitutionally Inadequate	32
II. The Evidence of "Actual Malice," Under Constitutionally Established Standards, Is Insufficient to Support a Jury Verdict for Rosenbloom	35
A. Error in the Charge of the District Court	35
B. The Record Could Not Constitutionally Sustain a Finding of "Actual Malice" and the Granting of a Judgment N. O. V. Should Be Affirmed	36
CONCLUSION	45

TABLE OF CITATIONS.

Cases:

Page

All Diet Foods Distributors, Inc. v. Time, Inc., 290 N. Y. S. 2d 445, 56 Misc. 2d 821 (Sup. Ct. 1967) 19

Associated Press v. Walker, 388 U. S. 130 (1967) 18, 23, 24, 26, 32, 36

Barr v. Matteo, 360 U. S. 564 (1959) 25

Beckley Newspapers v. Hanks, 389 U. S. 81 (1967) ..29, 36, 37, 40

Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704 (S. D. Ga. 1969) 19

Briarcliff L. Hotel v. C.-S.-Publishers, 260 N. Y. 106 (1932), 183 N. E. 193, reargument den., 261 N. Y. 537, 185 N. E. 728 43

Curtis Publishing Co. v. Butts, 388 U. S. 130 (1967) 18, 19, 23, 26, 32, 35, 36, 44

Farmers Educational and Coop. Union v. W. D. A. Y., Inc., 360 U. S. 525 (1959) 29

Garrison v. Louisiana, 379 U. S. 64 (1964) 25, 38, 42

Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (1964) 29

Ginsberg v. New York, 390 U. S. 629 (1968) 33

Griswold v. Connecticut, 381 U. S. 479 (1965) 27

Klahr v. Winterable, 4 Ariz. App. 158, 418 P. 2d 404 (1966) 29

Monitor Patriot Co. v. Roy, No. 891, cert. granted, February 24, 1970 20

Mounce v. United States, 355 U. S. 180 (1957) 39

N. A. A. C. P. v. Button, 371 U. S. 415 (1963) 21

New York Times v. Connor, 365 F. 2d 567 (5th Cir. 1966) ..37, 41

New York Times Co. v. Sullivan, 376 U. S. 254 (1964) 2, 12, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 31, 32, 33, 34, 35, 36, 37, 40, 42, 44

Pape v. Time, Inc., 354 F. 2d 558 (7th Cir. 1965) 29

Pickering v. Board of Education, 391 U. S. 563 (1968) 22

Red Lion Broadcasting Co. v. F. C. C., 395 U. S. 367 (1969) 29

Rosenblatt v. Baer, 383 U. S. 75 (1966) 23, 25, 29

Roth v. United States, 354 U. S. 476 (1957) 39

TABLE OF CITATIONS (Continued).

Page

St. Amant v. Thompson, 390 U. S. 727 (1968) 22, 37, 38, 40, 41, 44
Swaaley v. United States, 376 F. 2d 857 (C. Cl. 1967) 29
Thornhill v. Alabama, 310 U. S. 88 (1940) 21
Time, Inc. v. Hill, 385 U. S. 374 (1967) 25, 26, 27, 28, 32, 34
Time, Inc. v. McLaney, 406 F. 2d 565 (5th Cir. 1969), cert. denied, 395 U. S. 922 (1969) 19
United Medical Laboratories v. Columbia Broadcasting System, 404 F. 2d 706 (9th Cir. 1968), cert. denied, 394 U. S. 921 (1969) 19, 31
Washington Post Co. v. Keough, 365 F. 2d 965 (D. C. Cir. 1966) 42
Wasserman v. Time, Inc., 38 U. S. L. Week 2477 (D. C. Cir. March 10, 1970) 19

Law Reviews:

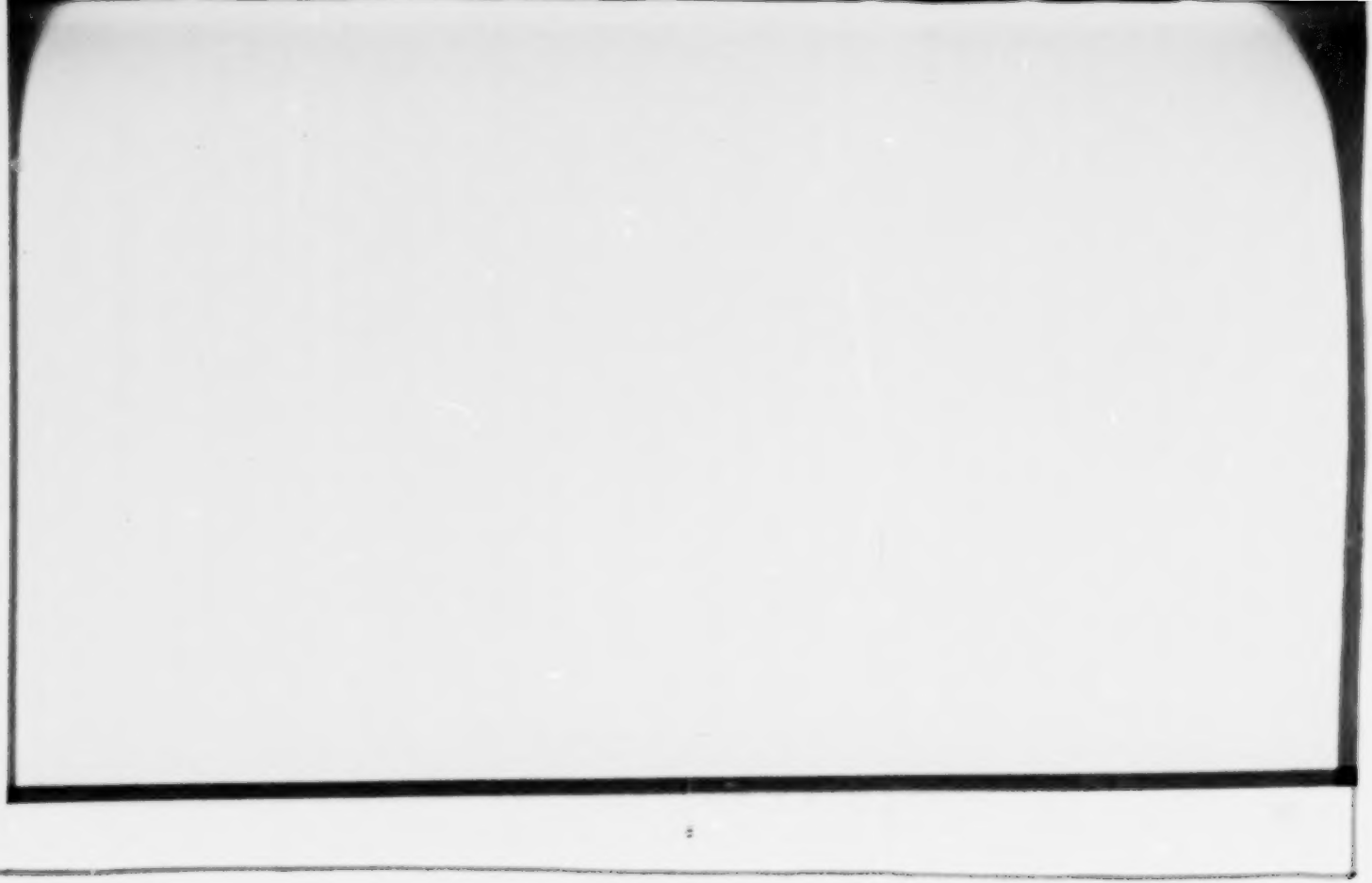
Comment, 115 U. Pa. L. Rev. 238 (1966) 28
Kalven, The Reasonable Man and The First Amendment: Hill, Butts, and Walker, 1967 The Supreme Court Review 267; 18 Cath. U. L. Rev. 423 (1969) 19, 25, 26, 28, 32, 33
Note, 67 Colum. L. Rev. 929 (1967) 19
Pedrick, Freedom of the Press and the Law of Libel, 49 Cornell L. Q. 581, 592 (1964) 19

Code:

28 U. S. C. § 1254(1) 1

U. S. Constitution:

First Amendment ...2, 16, 21, 22, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35
Fourteenth Amendment 30



IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 947

GEORGE A. ROSENBLOOM,

Petitioner,

v.

METROMEDIA, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit (461a-471a) is reported at 415 F. 2d 892 (1969). The opinion of the United States District Court for the Eastern District of Pennsylvania (435a-456a) is reported at 289 F. Supp. 737 (E. D. Pa. 1968).

JURISDICTION.

The judgment of the Court of Appeals was entered on September 15, 1969. The petition for a writ of certiorari was filed on December 12, 1969. The jurisdiction of this Court rests upon 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the court below correctly rejected the contention that the First Amendment protection defined by this Court in **New York Times Co. v. Sullivan,** 376 U. S. 254 (1964) must be limited to factual situations in which the defamation plaintiff is a public official or a public figure.

2. Whether the court below correctly held that the evidence adduced by petitioner in this case failed to establish that the broadcasts in issue were made with "actual malice."

CONSTITUTIONAL PROVISION INVOLVED.

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE.

A. The Facts.

In 1962, Outdoor American Company, a publisher of several so-called "nudist" magazines, offered to petitioner Rosenbloom a major distributorship which covered a substantial regional area from Atlantic City to Harrisburg and from Wilmington to Trenton (96a-97a).

Rosenbloom, who was experienced in the magazine distribution business, did not immediately accept the offer. Appreciating the problems in dealing with the subject matter, he first wanted an attorney's opinion on whether the principal owner of Outdoor American was really a "legitimate, registered nudist," whether the company had "a legal right to be in business," and whether "these magazines that they printed and published were legal" (95a-97a).

However, as Rosenbloom described it, "the potential in this area, the area that they gave me, was tremendous" (97a). Rosenbloom accepted the distributorship and entered into business on May 1, 1963 (179a). By the end of four months, he already had a well established business, involving sixty outlets at various newsstands, drugstores, and other vendors (180a), and believed that he was on his way toward attaining annual gross sales of half-a-million dollars (188a-189a).

In the fall of 1963, the Philadelphia Police Department began receiving complaints from the public concerning the allegedly obscene nature of certain books and magazines on sale at various newsstands around the city (259a-260a). At this point, there had been no adjudication that Rosenbloom was selling non-obscene materials. An investigation of these complaints was undertaken by the Special Investigation Squad under the supervision of Captain Clarence Ferguson (260a), a forty-eight year veteran of the Philadelphia Police

Force, who had participated in investigating alleged obscenity law violations for more than forty years (247a). The magazines and books complained of were purchased from the various newsstands and reviewed by Ferguson, who concluded that they were obscene (260a). In so doing, Captain Ferguson was performing one of the assigned functions of his squad. There is no support for petitioner's suggestion that Captain Ferguson, on October 1, had, as a personal matter, suddenly "decided to rid the city of pornography." (Brief for Petitioner, p. 7). As the record shows, the arrests on October 1 were preceded by complaints which led to investigation.

On October 1, 1963, the Special Investigations Squad of over 50 policemen (355a-356a) began a series of arrests which Captain Ferguson later described as "one of the largest raids in the City of Philadelphia" (249a).[1] Between October 1 and October 4, twenty-nine newsstand dealers, shippers, and distributors of allegedly obscene periodicals were arrested (99a-100a, 273a). Fifteen of the twenty-one dealers arrested on October 1 had accounts with Rosenbloom and Outdoor American, and Rosenbloom himself was arrested with a truckload of Outdoor American's magazines and books which he was delivering to one of his customers (99a). There is no basis in the record or in fact for petitioner's statement that Rosenbloom's arrest was "fortuitous" (Brief for Petitioner, p. 7). To the contrary, Captain Ferguson described Rosenbloom to WIP as one of the major distributors of objectionable literature in the City (251a).

1. WIP had no way of knowing what legal standards were applied for determining obscenity in connection with these arrests, and it is difficult to understand exactly for what purpose petitioner refers to Ferguson's admittedly unsophisticated definition thereof. Contrary to petitioner's statement (Brief for Petitioner, pp. 38-39), WIP had relied on Ferguson's reports in the past, and had found him reliable and accurate; nor had the station any reason to doubt the accuracy of his report on Rosenbloom's arrest (293a-294a).

Captain Ferguson called the United Press Wire Service and two local radio stations, one of which was WIP, to give them a detailed story of the arrests, mentioning specifically the arrest of Rosenbloom, whom Ferguson described as one of the major distributors of obscene literature in Philadelphia (248a-251a). Ferguson testified that he believed he had a duty to inform the public through the news media of major police activity and that he was authorized by the Police Commissioner to issue news releases (262a).

On the afternoon of October 1, The Evening Bulletin headlined the following report (414a-415a):

"POLICE RAIDERS ARREST 21 IN SALE OF SMUT. 5000 BOOKS AND MAGAZINES ARE CONFISCATED."

The subscribed article detailed the arrest of Rosenbloom and news dealers, all of whom were identified by name and address, and characterized the books and magazines distributed by Rosenbloom as obscene.

Other local news media also began reporting Rosenbloom's arrest, and referred to the publications which he had been distributing to the public as obscene smut (211a-215a). Rosenbloom subsequently sought damages and injunctive relief against the City of Philadelphia, the District Attorney, the Police Commissioner, The Evening Bulletin, Triangle Publications, Inc. (publisher of The Philadelphia Inquirer and The Philadelphia Daily News), and WCAU-TV, a local Columbia Broadcasting System television outlet (402a-413a), but not WIP. In that suit, Rosenbloom charged that the news media defendants had published articles, pictures, and stories on October 1, 2 and 3, 1963, which referred to Rosenbloom's publications as smut and obscene and which characterized Rosenbloom as a dealer in smut and obscenity (211a-215a, 406a-407a). One purpose of that suit, according to Rosenbloom, was to prevent further publicizing of his problem (140a). In this connection, Rosenbloom stated that he and his publisher

knew that "there were a lot of people who might disagree" with the publisher's philosophy and the type of magazine that he printed (140a).

On October 4, 1963, the police arrested seven more persons suspected of possessing or selling obscene literature, two of whom had been taken into custody after driving a truckload of alleged pornography from Maryland to Pennsylvania (273a). Rosenbloom, who had been released on bail after his first arrest on October 1, was rearrested (100a). The police discovered and seized Outdoor American nudist publications both at Rosenbloom's home and at a nearby barn which he had rented (263a).

Captain Ferguson reported the details of Rosenbloom's rearrest to WIP, including the seizure of publications which the police captain described as obscene (31a, 248a). As stated above, Captain Ferguson had given WIP information on police activities in the past and, contrary to petitioner's statement (Brief for Petitioner, p. 7), WIP had found him to be reliable (293a-294a). Rosenbloom's name had now been in the news for three days. At 6:00 p.m., on October 4, 1963, relying on Captain Ferguson as its source of information, WIP broadcast its first reference to Rosenbloom as part of its regular, half hourly newscast. The text of that portion of the newscast stated (350a):

> "The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

Rosenbloom's trial counsel conceded that the first and second sentences, which were true (310a), and the fourth sentence, which was merely a report of a police officer's opinion (317a), were not actionable in and of themselves. Thus, his argument rested on Station WIP's reference in the third sentence to the books seized at the barn as "obscene," rather than as "allegedly obscene," apparently on the theory that this converted the third sentence into a statement of WIP's own opinion (311a).

By the third WIP broadcast of Rosenbloom's rearrest, which was aired at 8:00 p.m., the same evening, the station had added the word "allegedly" to its reference to the nudist books seized in the barn (355a-356a). In the following 12 hours, until 8:00 a.m., on October 5th, WIP broadcast the news of Rosenbloom's arrest on five more occasions. In each broadcast, all the books were described as either "allegedly" or "reportedly" obscene (350a-368a).

The final broadcast by WIP referring to Rosenbloom by name was made on October 5, 1963, at 8:00 a.m.

During the 16 days that followed October 5, WIP continued to broadcast news programs twice an hour, twenty-four hours a day. None of these 750 broadcasts, each containing anywhere from six to fifteen or twenty news items, made any reference, either direct or indirect, to Rosenbloom.

On October 21, 1963, WIP, in a regular news broadcast, included the following five-sentence report on the first hearing in the unique suit for an injunction and damages filed by Rosenbloom against city officials and various news media (369a):

> "Federal District Judge Joseph S. Lord, Third,[2] will hear arguments today from two publishers and a

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2. The injunction motion was in fact heard by Judge John W. Lord, Jr. (152a).

> distributor . . . all seeking an injunction against Philadelphia Police Commissioner Harold Leary . . . District Attorney James C. Crumlish, Jr. . . . a local television station and a newspaper . . . ordering them to lay off the smut literature racket.
>
> "The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent . . . and if the injunction is not granted . . . it could signal an even more intense effort to rid the city of pornography."

WIP referred to the case several times in various half hourly newscasts on October 21 (369a-392a). At no time did the station name the two publishers or the distributor. The content of the reports varied. For example, five hours after this first broadcast, WIP reported the following (381a):

> "Judge John Lord, Jr., has requested legal briefs to be filed Friday by defendants in the plea for an injunction against local police . . . the D.A.'s Office and communications media lodged by publishers and distributors of alleged smut literature. All defendants moved for dismissal."

Four days later, on October 25, the station twice reported that the defendants' answers to the complaint were due. On November 1, WIP returned briefly to the injunction case with the following broadcast (400a-401a):

> "U. S. District Judge John Lord told WIP News just before airtime that it may be another week before he will be able to render a decision as to whether he has jurisdiction in the case of two publishers and a

distributor who wish to restrain the D.A.'s office, the police chief, a TV station and the Bulletin for either making alleged raids of their publications, considered smut and immoral literature by the defendants named, or publicizing that they are in that category. Judge Lord then will be in a position to rule on injunction proceedings asked by the publishers and distributor claiming the loss of business in their operations."

Rosenbloom's complaint in the very action described in the broadcasts alleged that (1) the defendants District Attorney, the City, and the police considered his nudist magazines obscene (405a), and (2) that defendants Triangle Publications, The Evening Bulletin and WCAU-TV had published articles and programs "referring to the plaintiffs' magazines and books as smut and obscene, in a false and malicious manner, and characterized the plaintiffs as dealers in smut and obscenity" (406a-407a).

Paul Rust, WIP's news manager, testified that the primary objective of the station's news department was not profit but to inform the public of significant, newsworthy public issues and events (62a). He noted that, with respect to the federal court injunction suit reported in the second series of broadcasts, the court action itself was more significant than the identity of the particular complainants (82a-83a). Consequently, WIP never identified the complainants, nor indicated whether they had been among those arrested between October 1 and October 4, 1963.

Rosenbloom never heard any of the WIP broadcasts which allegedly caused him injury (110a, 167a). He did not positively learn that WIP had ever broadcast any reports referring to him or to his lawsuit until October 26 or 27, 1963 (133a-138a).

Rosenbloom did not produce a single witness who had heard any of the first series of broadcasts on October 4 and

5. Nor did he produce a witness who had heard any of the second series of broadcasts on October 21 and 25 and November 1.[3] Consequently, there is no evidence anywhere in the record that either Rosenbloom or a single member of the public understood the second series of broadcasts to refer to George Rosenbloom, or to any of those persons arrested between October 1 and October 4 for selling or possessing allegedly obscene literature.

Rosenbloom testified that, on October 26 or 27, at 11:00 a.m., he presented himself at WIP in order to find out if WIP had in fact been making broadcasts about him (133a-135a). On the lobby telephone used whenever members of the public wanted to speak to newscasters, Rosenbloom explained to Nate Wright, a part-time newscaster, that he had come to ascertain whether WIP was broadcasting reports about him and to learn the actual content of those reports (136a-137a). Wright asked Rosenbloom to be more specific about the date and time of the broadcasts, explaining that WIP broadcasts news twice an hour, twenty-four hours a day (137a).

Rosenbloom then asked for the October 21, 1963, 12:00 broadcast (137a). Wright looked up the broadcast and read it back to Rosenbloom.

The 12 o'clock broadcast script read as follows (383a):

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3. The trial judge stated in his opinion on Metromedia's post trial motions, that Paul Rust, news manager at WIP, "was a broadcaster and listener who knew that the second series of broadcasts was, and was intended to be, about the plaintiff" (445a). Rust made one of the second series of broadcasts describing the lawsuit without identifying the plaintiff (73a-74a). The trial judge apparently considered a "broadcaster" to be a "listener." There is no evidence that Rust either broadcast or heard any other news report referring directly or indirectly to Rosenbloom. Rust did testify that, in his capacity as news manager, he "would presume" that he was aware of the fact that the second series of broadcasts was in fact referring to Rosenbloom (54a-55a).

"Arguments before District Judge Joseph Lord, Third in a publishers-distributor plea of financial and economic hardship in the city's crackdown on alleged smut literature have been postponed until Friday at the request of Defense attorneys. A TV station, the Evening Bulletin and the DA's office are the target of one publisher and one distributing firm."

At trial, Rosenbloom claimed that the broadcast read by Wright, referred to "the smut-girlie racket" and "smut-peddlers' claims" (137a). The noon broadcast typescript on October 21 referred only to "alleged smut literature" (383a).

After Wright read the broadcast, Rosenbloom told him that "the magazines involved in this were found to be completely legal and legitimate by the United States Supreme Court"[4] (137a).

Wright replied that the District Attorney had said that the magazines published by the complainants in the federal court action described in the October broadcasts were obscene (137a).

Rosenbloom claimed to possess a public statement by the District Attorney that "my magazines are completely legal, absolutely nothing obscene about them" (137a-138a). No such statement was ever introduced into evidence at trial. At the time he made the claim to Wright, Rosenbloom was in fact seeking to enjoin the District Attorney from further alleged harassment of Rosenbloom and Outdoor American, which made his claim concerning the District Attorney's alleged approval of his magazines impossible to accept. According to Rosenbloom's testimony, "at

4. Contrary to the implications in petitioner's brief (p. 6), there is no evidence that the legitimacy of Eden Magazine, Outdoor American's publication involved in this case, has ever been considered by this Court.

that point the telephone conversation was terminated . . . he just hung up" (138a).

As shown by his own version of his brief conversation with Wright—Rosenbloom's only contact with WIP—Rosenbloom never demanded a retraction from the station.

After Rosenbloom's visit to WIP, the only WIP broadcast which referred to his lawsuit was that of November 1, 1963, (*supra*, pp. 8-9) which petitioner does not claim to be actionable.

B. Proceedings in the District Court.

Rosenbloom's suit for damage was based on the first two of the series of broadcasts made on October 4th and 5th and on the series of broadcasts beginning on October 21 with reference to the court proceeding against the City of Philadelphia, Philadelphia officials and various news media. At the conclusion of the trial, the District Judge declined to view the case as appropriate for the application of the principles of **New York Times v. Sullivan**, 376 U. S. 254 (1964) as a limitation on the right of Rosenbloom to recover. Metromedia's motion for a directed verdict (241a) and for a binding instruction (427a) were denied. Instead, the jury was instructed to consider the case under the principles of Pennsylvania defamation law (324a-334a). The jury was instructed that the state law of defamation extended a privilege to Station WIP to report accurately certain news events conditioned on reasonable conduct in making the report and the use of reasonable diligence to determine the accuracy of the broadcasts (325a-327a). On the question of punitive damages, the jury was instructed that punitive damages could be awarded if the broadcasts resulted "* * * from a bad motive or malice toward the plaintiff * * *" or were published "* * * with reckless indifference to the truth * * * or with reckless disregard of

the rights of others, or reckless indifference to the rights of others * * *" (333a). The jury returned a verdict in favor of Rosenbloom for $25,000 actual damages and $725,000 punitive damages (343a). The District Judge reduced the punitive award to $250,000 on *remittitur* (458a). In sustaining the award of punitive damages, the evidence most heavily relied upon by the District Judge concerned Rosenbloom's brief conversation with a part-time employee at Station WIP (447a-451a). On this basis, the District Judge concluded that there was "* * * a recklessness of conduct as to the rights of others sufficient to warrant punitive damages." (451a). That incident has been fully described, *supra*, pp. 10-12.

After the jury had returned its verdict, the trial judge again rejected the contention that the principle of **New York Times** controlled the case and denied alternative motions for judgment n.o.v. or for a new trial (442a, 457a). In connection with the denial of these motions, the trial judge filed an opinion (435a-456a).

C. The Decision of the Court of Appeals.

The Court of Appeals reversed the District Court and held that Rosenbloom should have been required to meet the "actual malice" standard of proof formulated in **New York Times Co. v. Sullivan**, 376 U. S. 254 (1964). The court emphasized two distinct and separate factors in its decision: (1) that the subject matter of the broadcasts was of legitimate and established public interest; and (2) that the broadcasts were of "hot news", reported under conditions where, as the court said, "It is not realistic to require thorough research or verification of each individual item * * *" (464a-466a).

Having determined that the **New York Times** principle should have been applied, the Circuit Court then reviewed the record to determine whether the plaintiff had

produced convincingly clear evidence that Station WIP had made the broadcasts with a "reckless disregard of the truth" (468a-470a). As already noted, the District Judge had declined to charge the jury that the **New York Times** principle was applicable to the case.

In considering whether there was constitutionally sufficient evidence to sustain a jury verdict in favor of Rosenbloom, the Court of Appeals examined the so-called retraction incident on which the District Judge had principally relied. The Court of Appeals stated (469a):

> "• • • We think the evidence of the incident lacked both sufficient substance and clarity to meet the standard required to show actual malice. It amounted to little more than an argument and a difference of opinion between plaintiff and one of defendant's employees at a time when all except one of the challenged broadcasts had already taken place. Its value in considering the earlier broadcasts is dubious at best. . . . We think that the episode described failed to provide evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards."

The Court of Appeals next noted that Station WIP could not be expected to make thorough investigations of "hot news" items, and that, in holding to the contrary, the District Court had placed an improper burden on the station (469a-470a). As the court had earlier observed, the primary value of "hot news" to the public lies in conveying the latest news as promptly as possible so that the public may be informed of news items of immediate public concern. Station WIP had received the story from a police officer who had always been reliable in the past and the station had no reason to doubt the accuracy of his report (293a-294a).

Finally, the Court of Appeals noted that the District Court, in sustaining the punitive damage award, had characterized "highly inflammatory references" in the second series of broadcasts as evidence of a reckless disregard of plaintiff's rights and observed that (470a):

> "* * * It is difficult to see how characterizing them as inflammatory tends to prove the requisite awareness of their probable falsity."

The Court of Appeals thus concluded that the evidence was constitutionally insufficient to support a judgment for the plaintiff, and that the District Court should have granted defendant's motions for judgment (470a).

SUMMARY OF ARGUMENT.

I.

The Court of Appeals in this case rejected the restrictive interpretation placed by the District Judge on the principle that, under First Amendment protection of freedom of the press, damages for defamation can not be recovered unless there is proof of "actual malice" on the part of the publisher. Instead, the Court of Appeals held that the First Amendment "actual malice" rule applied whenever the challenged publication involved a matter of legitimate public interest. There is, of course, no question but that the publications involved in this case covered matters of legitimate public concern.

The decision of the Court of Appeals is clearly correct. Analysis of this Court's decisions, beginning with **New York Times v. Sullivan**, 376 U. S. 254 (1964), demonstrates that the decisive consideration in determining whether the "actual malice" protection applies, is whether the publication covers a matter of legitimate public interest. The availability of the protection does not turn on the status of the defamation plaintiff. Where, as here, the broadcasts were of matters of legitimate public concern, the fact that the defamation plaintiff was not a "public official" or a "public figure" is of no relevance.

Petitioner appears to concede that some form of First Amendment protection is warranted for the broadcasts in issue but urges that that protection is adequately measured by reference to the state law of defamation. Specifically, he argues that the "reasonable care" standard used in Pennsylvania to test the qualified privilege of fair comment will furnish sufficient constitutional protection to the broadcasts. This Court, in **New York Times**, has already rejected this "reasonable care" test, recognizing the self-censorship that would inevitably result from its use.

II.

The District Judge refused to charge the jury that the broadcasts in this case were entitled to any form of constitutional protection. His state law instructions on punitive damages fell short of a constitutionally adequate statement of the "actual malice" standard.

Even assuming adequate instructions, the record in this case can not constitutionally support a finding of "actual malice." There is no evidence that respondent entertained serious doubts as to the truth of the broadcasts. On the one occasion when petitioner communicated with respondent, after the challenged newscasts had been made, petitioner gave respondent no reason to doubt the accuracy of the newscasts. Respondent, in the course of preparing its half hourly, round-the-clock newscasts, had relied on experienced, reliable or customary sources, sources which were also used by the rest of the Philadelphia news media.

ARGUMENT.

I.

The Court of Appeals Correctly Held That, Because WIP's Broadcasts Concerning Petitioner Rosenbloom Involved Matters in Which the Public Had a Legitimate Interest, Those Broadcasts Were Protected by the First Amendment Standards of Proof Developed in New York Times Co. v. Sullivan.

A. The Rationale Underlying the Rule of New York Times Applies to the Present Case.

The Court of Appeals apparently assumed *arguendo* the District Court's conclusion that petitioner Rosenbloom was not a "public figure," [5] as defined in **Curtis Publishing**

5. Respondent maintained below and still takes the position that Rosenbloom indeed was a "public figure". The Supreme Court has never indicated that a "public figure" must be famous or notorious prior to the time when the allegedly defamatory statements are published. Instead, "public figure" means an individual whose deliberate conduct directly affects a substantial public issue, and in whose conduct the public consequently obtains a legitimate interest. *E.g.*, **Associated Press v. Walker**, 388 U. S. at 155. It would appear that anyone, anonymous or otherwise, might "thrust" himself into the heat of public debate and thereby become a "public figure." Rosenbloom, by his deliberate conduct, assumed the risk of exposure to the public eye. This did not require him to pursue "a role of leadership in public affairs." (Brief for Petitioner, p. 14.) Rosenbloom knew the controversial nature of Outdoor American's publications. He had requested an attorney's opinion on the legality of the publications. Regardless of whether the magazines were legally "obscene," Rosenbloom could not have helped but know that they were the subject of public controversy and were subject to intense criticism from certain members of the public (See, *e.g.*, 140a). Admittedly, Rosenbloom was "only trying to make a living," but he chose to do it in an area likely to excite public opinion. By becoming an active dealer in these magazines, Rosenbloom thrust himself "into the 'vortex' of an important controversy" *Id.* This qualified Rosenbloom as a "public figure" for First Amendment purposes.

Rosenbloom's arrest as part of this controversy gives additional support to the characterization of him as a "public figure."

Co. v. Butts, 388 U. S. 130 (1967), but nonetheless held that "the absence of a public figure [was not] of controlling importance here." (467a). Instead, the Court of Appeals ruled that the public interest in the subject matter of the broadcasts, coupled with the type of broadcasts involved, required the First Amendment protection guaranteed under **New York Times v. Sullivan,** 376 U. S. 254 (1964). The Court of Appeals thus ruled that, in order to obtain a constitutionally valid verdict, it was necessary for petitioner to establish that respondent's broadcasts were made with "actual malice" as defined in **New York Times** and subsequent decisions of this Court. This conclusion has been reached by other courts presented with the same issue and has been endorsed by commentators. See **Wasserman v. Time, Inc.,** 38 U. S. L. Week 2477 (D. C. Cir. March 10, 1970); **United Medical Laboratories v. Columbia Broadcasting System,** 404 F. 2d 706 (9th Cir. 1968), *cert. denied,* 394 U. S. 921 (1969); **Bon Air Hotel, Inc. v. Time, Inc.,** 295 F. Supp. 704 (S. D. Ga. 1969); **All Diet Foods Distributors, Inc. v. Time, Inc.,** 290 N. Y. S. 2d 445, 56 Misc. 2d 821 (Sup. Ct. 1967); **Time, Inc. v. McLaney,** 406 F. 2d 565 (5th Cir. 1969), *cert. denied,* 395 U. S. 922 (1969); Kalven, **The Reasonable Man and The First Amendment: Hill, Butts,** and **Walker,** 1967 The Supreme Court Review 267, 278-90; 18 Cath. U. L. Rev. 423 (1969); Note, 67 Colum. L. Rev. 929, 949 (1967); Pedrick, **Freedom of the Press and the Law of Libel,** 49 Cornell L. Q. 581, 592 (1964).

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5 (cont'd)

See, *infra,* p. 42 and argument at p. 31, fn. 15. The press could not be expected to inquire as to whether the arrest was justified. Such investigation would necessarily be inconclusive with respect to the legality of the arrest, would always be impractical and would be impossible with respect to the kind of "hot news" (See *Id.* at 157) which an arrest generally is.

In addition, Rosenbloom's novel litigation with local law enforcement agencies and news media (other than respondent) further limelighted his already acquired "public figure" status.

At the outset, petitioner obscures the real issue presented in this case by arguing that if the standard of **New York Times** is applied to Rosenbloom's action, it must also apply "to every libel suit." (Brief for Petitioner, p. 17). Petitioner's contention is based on the premise that the courts are constitutionally required to accept anything offered by the media as "newsworthy." This is patently untrue, and in any event is inapplicable in the present case.

There is no reason to assume that a judicial determination of what is legitimately in the public interest cannot be made. Petitioner himself, at a later point in his brief, argues that a distinction *can* be made between " 'matters of legitimate public interest' " and " 'matters of mere public curiosity.' " (Brief for Petitioner, p. 35). Certainly a holding that **New York Times** protection must be accorded to matters that are "newsworthy" in the sense that they are matters of legitimate public interest in no way requires the additional conclusion that *everything* that the media chooses to report is a matter of legitimate public interest.[6]

In any event, petitioner is in a poor position to press this argument. The broadcasts covered petitioner's arrest

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6. The Court adverted to a similar distinction in **Garrison v. Louisiana,** 379 U. S. 64, 72 n. 8 (1964) by indicating the existence of a "discrete area of purely private libels" in cases involving public officials. This can only be taken to refer to a statement which, although made about a public official, nonetheless does not refer to a matter of *legitimate public interest.*

Thus petitioner's statement that affirmance in this case necessarily requires reversal in **Monitor Patriot Co. v. Roy,** No. 891, *cert. granted,* February 24, 1970 (Brief for Petitioner, p. 18, n. 4), is unacceptable. If the proper standard for determining whether **New York Times** protection is to apply focuses on whether a publication involves matters of legitimate public interest, it would remain open to the Court to hold that Roy was subjected to private libel, *i.e.,* a defamatory statement concerning a subject with which the public had no legitimate concern. Whether the **Roy** record presents such a situation is another question, especially since Roy himself conceded at trial that the "bootlegging" charge, if true, would have been a relevant consideration to voters. (Record in No. 891, 9:158.)

for the sale and distribution of controversial material, objectionable to a significant portion of the community, and a unique law suit to insulate petitioner from "attack" by the City of Philadelphia, its law enforcement officers, and the news media. Neither the District Court nor the Court of Appeals had any doubt that the broadcasts involved matters of public interest, a point conceded by petitioner in his petition for certiorari (p. 2), as well as in his principal brief before this Court (p. 14). Thus, the question whether a matter of mere "public curiosity" which is defamatorily publicized by the media is also entitled to **New York Times** protection is not even properly presented by this record. The basic question here is whether broadcasts concerning matters of legitimate public interest come within the rule of **New York Times.**

The decision in **New York Times** is, in essence, a logical corollary of cases such as **Thornhill v. Alabama,** 310 U. S. 88, 95 (1940) and **N. A. A. C. P. v. Button,** 371 U. S. 415 (1963). **Thornhill** made clear that freedom of expression concerning public questions comes within the protection of the First Amendment. **Button** held that for First Amendment rights to be viable, they must be provided with "breathing space." The Court in **New York Times Co. v. Sullivan** held that First Amendment freedoms were not afforded sufficient "breathing space" if the fear of their utilization might lead to self-censorship:

> "* * * The judgment awarded in this case * * * was one thousand times greater than the maximum fine [for criminal defamation] * * *. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive * * *.
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> * * *

> "• • • A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions • • • does not mean that only false speech will be deterred • • •. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true • • •. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." 376 U. S. at 277-79.

The Court, in **New York Times**, did not reject the value of state defamation laws, nor did it endorse the making of false statements directed at public officials; it simply conceded, quoting Madison, that "'some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.' 4 Elliot's Debates on the Federal Constitution (1876), p. 571." 376 U. S. at 271. Rather, "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open • • •" required the press to be free from the fear of devastating damage claims for conduct which does not involve calculated falsehood. 376 U. S. at 270. Although false statements do not in themselves merit First Amendment protection, erroneous publication must be tolerated and protected to insure the ability of the press properly to air matters of public concern. **St. Amant v. Thompson**, 390 U. S. 727, 732 (1968).

The opinion in the **New York Times** case provides only a starting point for the development of a First Amendment doctrine which protects the news media in its attempts to report on "public issues." The ultimate reach of **New York Times** must be established by case-by-case evolution. **St. Amant v. Thompson**, 390 U. S. 727, 730 (1968). See, *e.g.*, **Pickering v. Board of Education**, 391 U. S. 563 (1968). Thus, the **New York Times** rule already has been applied to cases different on their facts from **New York Times**

itself, and logic requires that the present case, involving a news broadcast of undisputed public interest, be brought within the protection of the **New York Times** standard.

In **New York Times**, the Court, properly dealing only with the facts before it, applied the "actual malice" standard to suits brought by public officials as an initial step in developing constitutional protection for news media reports of public issues. **Rosenblatt v. Baer**, 383 U. S. 75 (1966) then gave early indication that the **New York Times** doctrine would evolve by the application of logical, not mechanical, tests.

Rosenblatt held that a relatively obscure county recreation supervisor could be encompassed by the "public official" category. Quoting from the **New York Times** endorsement of vigorous debate on public issues, the Court in **Rosenblatt** held that a "public official" was one who holds a "position in government [which] has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, * * *" 383 U. S. at 86. Thus, "public official" is defined in *terms of interest of the public* in the performance of a given job. The Court focused on the public's right to be informed about vital matters of public import in determining about whom the press could write without fear of the chilling danger of a large defamation verdict for conduct falling short of actual malice.

Curtis Publishing Co. v. Butts and **Associated Press v. Walker**, 388 U. S. 130 (1967) logically brought "public figures" as well as "public officials" within the First Amendment protections of **New York Times**. The Court[7] noted

7. Mr. Justice Harlan delivered the judgments of the Court and authored the opinion which brought "public figures" within the constitutional ambit of **New York Times**. However, a

that "the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in **New York Times**. And both Butts and Walker commanded a substantial amount of independent public interest at the time of the publication; * * *" 388 U. S. at 154-55.

The situation in **Walker** is particularly instructive. Walker was held to have come within the **New York Times** standard by having thrust himself "into the 'vortex' of an important public controversy, * * *" *Id.* at 155. Because he had a role in a matter of public interest, Walker could not prevail in a libel suit, the success of which would deprive the press of the "breathing space" necessary to inform the public about public controversies. Accordingly, **New York Times** of necessity applied.

Wally Butts was subject to the limitations imposed by **New York Times** because the public had a legitimate interest in his conduct. General Walker, described as a man of some political prominence, 388 U. S. at 140, might have been of some interest to the public for that reason. Nevertheless, it is clear that the public's primary interest lay in Walker's conduct with respect to a vital public question. The public would have an equally compelling and legitimate interest in any person, regardless of how "private" or anonymous he might previously have been, who made a speech as Walker did to an angry segregationist mob at the University of Mississippi. The public's primary interest is in the conduct of the speaker and in the content, effect and significance of the speech, not in the speaker's prior fame or notoriety.[8] As one commentator has pointed out:

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7 (cont'd)
majority of the Court rejected Mr. Justice Harlan's thesis that a different standard of protection than the **New York Times** actual malice rule should apply.

8. The prominence of the plaintiff at the time the defendant speaks bears little relationship to the essential First Amend-

"It is not because one is a public official [or a public figure] that one's rights in defamation are limited; rather, it is because recovery would have an inhibiting effect on discussion of a public *issue* * * * the nature of the issue, not the charaterization of the plaintiff, is determinative". Note, 67 Colum. L. Rev. 929, 949 (1967) (Bracketed material added.)

Time, Inc. v. Hill, 385 U. S. 374 (1967) confirms the soundness of this approach. In the **Hill** case, plaintiff was a non-public figure who brought an invasion of privacy action against defendant publisher. The action rested on defendant's magazine article containing false statements about the experiences of plaintiff's family while held hostage by escaped convicts. This Court recognized that plaintiff was an inconspicuous private citizen exposed involuntarily to the public eye and thus subjected to embarrassment and injury. This, however, was not enough to remove First Amendment protection from the defendant under the actual malice standard.

Because of the New York Court of Appeals' interpretation of state law, the Supreme Court, in **Hill**, was not faced with having to determine the constitutionality of a rule that would subject publishers to liability for totally true, but privacy-invading statements. This would present a parallel to the defamation rule which constitutionally prohibits liability for *true* statements made about public officials "on a showing of malice in the sense of ill will." **Garrison v. Louisiana**, 379 U. S. 64, 71-72 (1964). As Professor Kalven wrote, it became unnecessary for the Court to state explic-

8 (cont'd)
ment values underlying *protection of the words spoken*. Indeed, conditioning the scope of the privilege upon the status of the party defamed revives the logical error committed by those who attempted to limit the **New York Times** privilege to public officials as defined in **Barr v. Matteo**, 360 U. S. 564 (1959). This argument was explicitly rejected in **Rosenblatt v. Baer**, 383 U. S. 75, 85, n. 10 (1966).

itly its key premise, *i.e.*, "that the 1st Amendment requires that the truthful reporting of newsworthy events and people not be subjected to liability. * * * [T]he ambit of 'constitutionally scrutinizable' speech is measured by newsworthiness." Kalven, *supra*, at p. 281.[9]

Time v. Hill presents a case where private citizens were exposed to the glare of publicity by a magazine article which contained false, as well as true, statements which proved embarrassing and damaging to plaintiffs. Nonetheless, the publisher was held to be protected under the standards announced in **New York Times**. In defining the borders of First Amendment actual malice protection, the Court stated:

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of

9. Petitioner argues that **Hill** is irrelevant to defamation actions because the Court in **Butts** and **Walker**, decided after **Hill**, relied on a "public figure" test. Although it has been suggested that it would have been more logical to have concluded in **Butts** and **Walker** that **Hill** "foreclosed the ambit issue", Kalven, *supra*, at 286, the treatment in **Butts** and **Walker** reflects the Court's concern with developing the **New York Times** doctrine on a case-by-case basis, without making commitments to positions not presented within the narrow borders of the case before the Court.

society to cope with the exigencies of their period.' *Thornhill v. Alabama,* 310 U. S. 88, 102. * * *'' 385 U. S. at 388.

Time v. Hill thus establishes that matters that are of legitimate public interest are within the area of First Amendment concern. There seems no logical reason for distinguishing invasions of privacy from defamations in determining the area to which the First Amendment applies.[10] Initially, once it is determined that a certain *type* of communication, *i.e.,* a report of a legitimately newsworthy occurrence, is within the area where constitutional protection applies, it is illogical to remove that type of speech from the protected area because of a distinction in the bases of particular *plaintiffs'* causes of action.

Regardless, the relative "worth" of privacy as opposed to reputation can be determined only on an individual basis,[11] depending on one's personality and values, station in life, family position, geographic location, and other factors. This is especially true in the context of the **Hill** case, where privacy was deemed to involve not only interference with the "pure" right to be left alone, but fictionalization as well. Thus, the Court in **Hill** noted that, while exposure to the public view was, of course, the primary problem in a privacy case, damage to reputation, the heart of a defamation cause of action, played a part as well. 385 U. S. at 385

10. The Court of Appeals, perhaps reluctantly, accepted the District Court's conclusion that the statements in the first series of broadcasts were actionable as libel *per se* (462a-463a), since the omission of the word "allegedly" in a single sentence of the broadcast could scarcely convert privileged reporting into a non-privileged category (*supra,* p. 7). Accordingly, this record (at least as to the first series of broadcasts) perhaps more realistically deals with nondefamatory matters and proximates some of the material in **Hill.**

11. Indeed, the right of privacy might be viewed as more substantial than reputational rights, having risen under certain circumstances to constitutional stature. See, *e.g.,* **Griswold v. Connecticut,** 381 U. S. 479 (1965).

n. 9. Consider, for example, that in **Hill**, the article at issue was concerned with beatings received by the family, and in addition, indicated that the Hill's daughter had been "subjected to a verbal sexual insult." *Id.* at 378. Certainly, the difference in the damage inflicted by a publication of this type, grounded in untruth, and that following from a "usual" defamation is conjectural at best, and is intimately related to the personality of any given plaintiff. For example, it can be safely assumed that the Hill family suffered more from publication than did General Walker. Thus, if there is any distinction between the damage inflicted by defamation and the damage inflicted by invasion of privacy, it is so variable and conjectural that it can not logically be raised to a constitutional dimension.

In short, the rationale of **New York Times**, which gives "breathing space" to First Amendment liberties "by insulating conduct previously considered one step beyond those rights," Comment, 115 U. Pa. L. Rev. 238, 256 (1966), and of **Hill**, gives the press constitutional protection in reporting matters of public interest. Kalven, *supra*, at 284.

Petitioner's argument, apparently accepted by the District Court, that in a defamation context, the non-public figure's inability to "answer" charges or statements made against him because of his lack of access to the public forum removes communications involving matters of public interest from the First Amendment protection of **New York Times** is unsound.

The common law right to recover damages for defamation does not depend on the power of the defamed person to respond but is grounded on the theory that a response to the defamatory statement will not suffice to cure the claimed harm. In other words, a plaintiff's right to recover special or general damages for defamation is not lessened or lost by a showing that he had opportunity to answer. By the same token, the question whether the challenged statement on a matter of public interest is entitled to First Amendment

protection should not be held to turn on whether there was a power of response in the defamation plaintiff. The regulations and rules of the Federal Communications Commission which govern the activities of broadcasters should be considered in evaluating this "counter-argument" advocacy of petitioner. Cf., **Farmers Educational and Coop. Union v. W. D. A. Y., Inc.**, 360 U. S. 525 (1959); **Red Lion Broadcasting Co. v. F. C. C.**, 395 U. S. 367 (1969).[12]

Another obvious weakness in the unequal access argument is that it assumes that the "public figure" will continue to have access to the public forum to respond to the defamatory statements. While this might be true if the category of "public official" or "public figure" had been limited to upper echelon government officials, and extremely famous persons, it can hardly apply to individuals like the plaintiff in **Rosenblatt v. Baer**, *supra*,[13] who was nothing more than the deposed supervisor of a county recreational area. It does not seem likely that Baer's access to the public forum would have been any greater than petitioner Rosenbloom's at the time the defamatory statements directed at the two were made.

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12. Petitioner correctly concedes that "this case does not involve . . . the fairness doctrine" (Brief for Petitioner, p. 32; see, also, footnote 16). Like the **New York Times** rule, the fairness doctrine is "issue oriented" and not "person oriented." The personal attack provisions of that doctrine do not apply to *bona fide* news broadcasts, thus giving greater First Amendment latitude in the performance of a broadcaster's affirmative duty to inform the community on matters of public interest and concern. **Red Lion Broadcasting Co. v. F. C .C.**, *supra*, at 374.

13. For additional cases on who is a public official, see **Beckley Newspapers v. Hanks**, 389 U. S. 81 (1967) (state court clerk); **Swaaley v. United States**, 376 F. 2d 857 (C. Cl. 1967) (federal shipyard official); **Pape v. Time, Inc.**, 354 F. 2d 558 (7th Cir. 1965) (deputy chief of detectives) (cases cited therein); **Gilberg v. Goffi**, 21 App. Div. 2d 517, 251 N. Y. S. 2d 823 (1964) (partner in mayor's former law firm); **Klahr v. Winterable**, 4 Ariz. App. 158, 418 P. 2d 404 (1966) (member of university student senate).

Finally, to condition First Amendment protection upon the defamed party's access to the news media ultimately suggests constitutionally unsupportable discrimination. For example, a newspaper might publish a defamatory report about two equally anonymous individuals, one wealthy and one poor, both of whom clearly had been "intimately involved" in a controversy of substantial public significance. The wealthy, anonymous man could buy access to the media. The poor, anonymous man could not. The proposition that the rich man, solely because of his wealth, is less entitled than the poor man to legal protection of his reputation would violate the equal protection concept of the Fourteenth Amendment. Further, the public has an equal interest in the conduct of each man, and the First Amendment protection of the published statements rests on the public's right to know, and not on the plaintiffs' relative wealth.[14]

In addition, petitioner argues that unlike, for example, Butts and Walker, he did not "assume the risk" of being

14. In making his "unequal access" argument, Rosenbloom implied that WIP was somehow at fault in mentioning him by name in reporting the initial news stories about the police raids and attendant arrests. As a practical matter, it is logical that in broadcasting a news report of an arrest, WIP, following accepted practice in reporting arrests (cf. 414a-415a), would give the name of the person or persons arrested. The fact that WIP did not name all twenty-nine persons arrested is irrelevant, especially considering the fact that Rosenbloom was identified as a major distributor by the police and that WIP's reports consisted of five minute newscasts that covered numerous other items, including other arrests (350a-351a).

Furthermore, Rosenbloom's identity was in itself a matter of public concern. There is no doubt that Rosenbloom was engaged in a business which was objectionable to a not insubstantial number of persons in the community. Rosenbloom knew this (140a). Regardless of whether or not the publications were obscene, objecting persons might be interested in showing their displeasure with Rosenbloom's activities, perhaps by exercising their own First Amendment rights at a peaceful demonstration at Rosenbloom's place of business. Likewise, persons upholding Rosenbloom's right to sell the materials in question might wish to support him in a similar manner.

defamed by constitutionaly protected publications. This is so, according to petitioner, apparently because Butts and Walker were known to the public before the defamatory publication appeared.[15] This argument ignores the fact that Rosenbloom *voluntarily* became involved in an endeavor that could not help but stir public emotions, a fact he knew well from the outset. See, *supra,* p. 3, fn. 1. Furthermore, Rosenbloom *voluntarily* brought a lawsuit which he knew was novel. Petitioner could not have expected to profit from the sale of his magazines without becoming involved in the controversy surrounding their allegedly detrimental effect on the community. As petitioner concedes, legitimate public concern goes far beyond the narrow area of government. It would seem unarguable, regardless of one's opinion on the subject, that the debate concerning the effect of petitioner's nudist magazines on the moral structure of the community was at least as important as the Georgia-Alabama football game.

In the end, it is evident that the present case is exactly of the type that the rationale of the **New York Times** rule intended to protect. WIP provided around-the-clock news broadcasting on the hour and half-hour. The rough physical appearance of the scripts which were in evidence at the trial in this case dramatizes the haste with which these newscasts must be assembled and prepared for broadcast. This type of almost instantaneous reporting of important public events is a function which radio can perform particularly well. Certainly it cannot be disputed that the public has a strong interest in receiving speedy reports of

15. This argument assumes that a second and subsequent publication might be entitled to constitutional protection but that a first publication would not be so protected, an obviously untenable distinction. As observed in the **United Medical** case, 404 F. 2d at 712, "* * * though limelight may be a factor in public interest occurring, it can hardly be held to constitute a condition for the right of public interest to exist."

matters of public controversy. The Court of Appeals correctly noted that WIP was in the business of broadcasting "hot news," see **Curtis Publishing Co. v. Butts**, 388 U. S. at 157 (opinion of Mr. Justice Harlan). If the First Amendment protection enunciated in **New York Times v. Sullivan** is not afforded to broadcasts of this type, the fear of a devastating damage suit like the one brought in the present case may make the risk of continuing this type of newscast prohibitive. Clearly this would produce the type of "chilling effect" that **New York Times** aims at eliminating. Thus, the **New York Times** standard of "actual malice" is necessary to provide the requisite amount of "breathing space" to permit the continuation of news broadcasting, a type of communication of obvious First Amendment concern. In short, some negligent error, not resulting from actual malice, must be tolerated to permit the viable functioning of radio's "instant news" service. The Court of Appeals joined other courts and commentators in reaching the proper result on the basic issue, and its decision should be affirmed.

B. Petitioner's Proposed Standard of "Reasonable Care" Is Constitutionally Inadequate.

Petitioner apparently acknowledges that WIP's broadcasts are deserving of constitutional protection, but maintains that they should be judged under a "reasonable care" standard. This approaches the position taken by Mr. Justice Harlan in **Butts** and **Walker**, and in **Hill**, which was rejected by a majority of the Court, and which presents numerous theoretical difficulties. See Kalven, *supra*, at 298-303.

In addition, several considerations suggest that a mere showing of negligence should not be sufficient to cause defeasance of the First Amendment protection which attached to Metromedia under the facts of this case. The application

to communication activities of the ordinary tort liability rules found appropriate for other activity would be entirely inconsistent with the "preferred position" historically accorded to free speech. Tort liability rules serve not only to compensate the injured, but also to inhibit injurious conduct by others. Inhibition of many activities is perfectly acceptable, but inhibition of free speech is repugnant to the First Amendment. Compare **New York Times**, at 376 U. S. at 278-279. As one observer has expressed it, "That, in brief, is what the traditions of the First Amendment are all about—a special sensitivity to the risks of inhibiting communications activity and services." Kalven, *supra*, at 301. If the principle that "debate on public issues should be uninhibited, robust, and wide-open," (**New York Times**, 376 U. S. at 270), is to be maintained, then, in the world of the First Amendment, there can be no room for a censorial power based on "the reasonable, prudent man." Kalven, *supra*, at 303.

Petitioner's argument that this Court has considered reasonable care to be a utilizable standard in dealing with First Amendment questions is unsupportable. In fact, there is indication that the Court believes that subjecting publishers to liability for mere negligence would chill First Amendment freedoms by promoting self-censorship.[16]

The answer to petitioner's contention is that **New York Times** and its progeny already have decided that the reason-

16. **Ginsberg v. New York**, 390 U. S. 629 (1968), the only case cited by petitioner in support of his position, is inapposite. **Ginsberg** sustained against attack on *vagueness grounds*, a state statute that prohibited the sale of certain materials to minors, while affording a seller a defense of "honest mistake" as to the buyer's age. *Id.* at 645. The Court merely held that the statute's proviso that "a reasonable bona fide attempt to ascertain the true age" of the purchaser made the statute sufficiently specific. This narrow inquiry, presented in a vagueness context, is not at all similar to that which would be required of WIP in the present case, were it obligated to be non-negligent in the preparation of materials for its half hourly newscasts.

able care test is not enough, once a First Amendment question is presented. Obviously, if the Court in **New York Times** believed that subjecting publishers to a negligence test would not promote self-censorship, it would have been unnecessary to apply the actual malice standard. **New York Times** thus must be read as a clear-cut decision that self-censorship, and the attendant chilling of free speech, necessarily would result if publishers were to be held liable for negligent defamations. The high likelihood of self-censorship is equally present regardless of the status of the plaintiff, be he public official, public figure, or actor in a matter of legitimate public interest. Of course, where legitimate public interest is not involved, speech might be completely outside the zone of constitutional interest. But no one maintains that this rule would apply in the present case. Even petitioner notes that the "critical question is what constitutional standard will protect public debate here." (Brief for Petitioner. p. 32).

The Court in **Time v. Hill** again made clear that a negligence test could not be constitutionally valid. 385 U. S. 389. Although the Court admittedly noted that reasonable care would be an *especially* inadequate standard in a privacy case, its reasoning reaffirms the decision that negligence would be a constitutionally unsupportable test in a defamation case as well. Requiring a publisher to guess whether a jury would find reasonable its investigatory procedures here too would cast a pall over the use of speech protected by the First Amendment.

Under **New York Times**, the Court has been quite strict in requiring a *de novo* review of the evidence of actual malice so as to insure constitutional protection. See p. 37, *infra*. Petitioner's proposed reasonable care test falls so far short of this standard as to be patently inadequate. Even if petitioner be correct in maintaining that a lesser degree of protection should be applied in the reporting of

"hard news" to the public (a position with which we cannot concur),[17] the record in this case demonstrates that defense counsel alternatively requested the District Court to charge the jury in accordance with the "Rule of Four" drawn from the more conservative minority view of the First Amendment expressed by Justice Harlan in the **Butts** case (427a). The requested charge was denied (336a), even though the record convincingly demonstrates that there was not the slightest departure from "accepted publishing standards" (406a-407a, 414a-415a).

II.

The Evidence of "Actual Malice," Under Constitutionally Established Standards, Is Insufficient to Support a Jury Verdict for Rosenbloom.

A. Error in the Charge of the District Court.

The refusal of the trial court to charge the jury that Metromedia's defense must be considered under the standard of constitutional protection of the **New York Times** case was prejudicial error; and this error was not cured by the fact that the jury awarded punitive damages under state law instructions. The showing of malice necessary under state law for an award of punitive damages may be predicated, as the trial judge charged, upon ill will toward the plaintiff, or upon "reckless disregard of the rights of others" (333a). As the Supreme Court has made plain, the proper charge on the actual malice standard defined in the **New York Times** case requires a finding that the defendant had

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17. The reporting of police interference with the claimed First Amendment rights of petitioner and his subsequent court attempts to curtail these same press freedoms is, in our judgment, a matter of the highest public interest and concern, deserving of an absolute or near absolute privilege.

knowledge of the falsity of the challenged statements or a high degree of awareness of their falsity or probable falsity. The distinction between this charge and the usual state law charge on punitive damages has been meticulously observed by the Supreme Court, and strict adherence to the **New York Times** standard has been required. See **Beckley Newspapers v. Hanks**, 389 U. S. 81 (1967); **Associated Press v. Walker**, 388 U. S. 130 (1967). As Chief Justice Warren warned in the **Butts** case (388 U. S. at 166):

> "Unquestionably, in cases tried after our decision in *New York Times* we should require strict compliance with the standard we established. * * *"[18]

In other words, the erroneous charge given by the trial court alone required the granting of a new trial, even assuming *arguendo* that the record could support a jury finding of actual malice on constitutionally proper instructions.

B. The Record Could Not Constitutionally Sustain a Finding of "Actual Malice" and the Granting of a Judgment N. O. V. Should Be Affirmed.

Even under a proper charge, a jury verdict finding of "actual malice" could not be sustained on this record. The Court stated in **New York Times** that "considerations of

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18. The **Butts** case was tried before the Supreme Court announced its decision in the **New York Times** case and the instructions there given by the trial judge were not strictly in compliance with the **New York Times** standard. As noted above, Chief Justice Warren, who cast the decisive vote in the 5-4 decision affirming the plaintiff's verdict in **Butts**, made plain that, in cases tried after the **New York Times** decision, no deviation from the **New York Times** standard would be accepted. The erroneous charge in this case can hardly be excused on grounds of "surprise," in light of the number of courts and commentators which were fully capable of determining that **New York Times** was applicable to a case of this type without the benefit of an explicit ruling by this Court. See p. 19, *supra*.

effective judicial administration require" the appellate court "to review the evidence in the present record to determine whether it could constitutionally support a judgment" for the plaintiff. 376 U. S. at 284-285. The Court reiterated the principle that, in cases involving free speech, an independent examination of the record is warranted, 376 U. S. at 285, and proof of actual malice must appear to be of a convincingly clear quality, 376 U. S. at 285-286; **Beckley Newspapers v. Hanks**, 389 U. S. at 83. The Court of Appeals properly followed these dictates in ruling that, on the record before it, a judgment n.o.v. for respondent should have been entered.

The issue is whether the evidence demonstrated that WIP had made the broadcasts with reckless disregard of their truth or falsity. In **St. Amant v. Thompson**, 390 U. S. 727, 731 (1968), the Court noted that prior cases made "clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

In attempting to establish actual malice, petitioner strongly emphasizes his own testimony concerning his visit to WIP in late October, 1963, describing the station's alleged disregard for his protests. This evidence apparently greatly influenced the District Court (449a-450a). In **New York Times**, the Court held that defendant's refusal to retract an allegedly libelous advertisement was not adequate evidence of malice for constitutional purposes. The Court did not decide "whether or not a failure to retract may ever constitute such evidence." 376 U. S. at 286.[19]

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19. See also **New York Times v. Connor**, 365 F. 2d 567, 576 (5th Cir. 1966) (refusal to retract held inadequate evidence of reckless disregard of the truth).

An alleged refusal to retract would appear to have little evidentiary value as to whether acts which took place *before* the refusal to retract were committed with actual malice. The standard for determining whether a defendant acted with reckless disregard of the truth focuses on whether he "in fact entertained serious doubts as to the truth of his publications," **St. Amant v. Thompson,** 390 U. S. at 731. He must act with a "high degree of awareness" of the probable falsity of the statements published. **Garrison v. Louisiana,** 379 U. S. at 84. Therefore, the existence or nonexistence of a "reckless" state of mind depends upon the information possessed by the publisher at the time of the publication.

A publisher's subsequent refusal to retract is not even necessarily *consistent* with a prior awareness of the probable falsity of his statements. Absent a showing of ill-will towards the plaintiff, which concededly is not present in this case, a refusal to retract would, if anything, seem to indicate that the defendant believed that his prior statements were *true.* Certainly, if a publisher held no personal animosity toward a plaintiff, there is no reason why a refusal to retract in any way would logically indicate that the publisher had previously entertained serious doubts as to the truth of his publications.

Of course, a request for retraction arguably could put a publisher on notice that the accuracy of his prior statements might be questionable. But this would provide evidentiary support for a finding of "recklessness" only with respect to publications made *after* the request for retraction. Here, the only broadcast by WIP after Rosenbloom's visit, made on November 1, 1963, was an entirely accurate report of a judicial proceeding. See, *supra,* pp. 8-9, 12. After Rosenbloom's conversation with Nate Wright, the station checked with Judge John Lord before making its totally accurate broadcast of November 1, 1963. Without

question this procedure evidenced WIP's high regard for the truth of its news reports; prior to Rosenbloom's visit, the station had had no reason to entertain doubts as to the accuracy of its broadcasts.

Even assuming *arguendo* that a refusal to retract could serve as evidence indicating "actual malice" as to acts committed prior to the refusal, it is difficult to see how significant weight can be attached to Rosenbloom's testimony concerning his conversation with respondent's part-time newscaster in this case. The record does not indicate that Rosenbloom ever made a request for a retraction. Rather, Rosenbloom merely stated that he had come to the station to learn whether certain statements had been made about him and his lawsuit. He told Wright that the Supreme Court had declared his magazine to be legal,[20] and that he had a statement from the District Attorney which admitted that the magazines were legal. Wright knew that Rosenbloom, at that very time, was seeking to enjoin the District Attorney from prosecuting Rosenbloom on the

20. Petitioner's brief (p. 6) refers to **Mounce v. United States**, 355 U. S. 180 (1957) as suggested support for this portion of Rosenbloom's conversation with Wright. The **Mounce** decision, one paragraph in length, merely remanded the Ninth Circuit's decision holding certain publications obscene, to the district court for reconsideration in light of **Roth v. United States**, 354 U. S. 476 (1957). No opinion was offered on the obscene nature of the magazines. Subsequent disposition of the case, if any, is not reported. Furthermore, only one of the magazines in the **Mounce** case, "Paradise," was seized (in the amount of 13 copies) in Rosenbloom's arrest, and the magazine here in issue was published at least six years subsequent to the Supreme Court decision. "Eden" was not considered in the **Mounce** discussion. Had any WIP employee possessed the legal skill to find, read and understand the **Mounce** opinion, he would have remained singularly unenlightened with respect to the Supreme Court's opinion of the legitimacy of the publications which prompted Rosenbloom's arrests. Indeed, the **Mounce** opinion would merely have confirmed that Rosenbloom's claim to Supreme Court approval made to Nate Wright was entirely unfounded in fact.

criminal charges stemming from the arrest and that the police and the District Attorney claimed that Rosenbloom's magazines were obscene. It thus became more reasonable for Wright to have doubted the truth of Rosenbloom's statement, really a confirmation of WIP's original belief in the accuracy of its prior publication. On this basis, Wright was justified in terminating the conversation. In any event, Wright's conduct seems irrelevant in determining whether WIP's earlier newscasts were made with a "high degree of awareness" of their probable falsity.[21]

Nor are the alleged investigatory failures of WIP sufficient to support a finding of reckless disregard for the truth. In the **New York Times** case, this Court pointed out that the presence in the Times' files of news stories indicating the falseness of the defamatory advertisement at issue did not establish that the Times "knew" the advertisement to be false. The Court further pointed out that "* * * the state of mind required for actual malice would have to be brought home to the persons * * * having responsibility for the publication of the advertisement." 376 U. S. at 287. Thus, "failure to investigate does not in itself establish bad faith." **St. Amant v. Thompson**, 390 U. S. at 733. See **Beckley Newspapers v. Hanks**, 389 U. S. at 84-85.

In **Beckley Newspapers v. Hanks**, there was testimony on the record that defamatory editorials were written by employees of the defendant merely because "there was cause on their part to feel there was that possibility." 389 U. S.

21. Further, since the broadcast which Rosenbloom asked Wright to read to him did not refer to Rosenbloom by name, Wright might reasonably have doubted that any retraction was necessary, even assuming one had been requested. This precise point was noted by the Supreme Court in the **New York Times** case. There, after questioning whether failure to retract could ever be evidence of malice for constitutional purposes, the Court held that failure to retract was not such evidence in that case because the Times reasonably doubted whether the advertisement involved could reasonably be taken as referring to the respondent. 376 U. S. at 286.

at 84. Nonetheless, the Court held this to be insufficient to establish the high degree of awareness of probable falsity necessary for a finding of actual malice.

In the present case, WIP did not depend on the mere "possibility" that its statements were accurate, but instead relied on established sources. Any attempt to show that the sources utilized by WIP were so questionable that reliance on them would provide the basis for a finding of actual malice would have to be supported on the record by positive evidence of untrustworthiness or previous bad experiences by the respondent. **St. Amant v. Thompson**, 390 U. S. at 733. Not only did plaintiff fail to carry its burden of proof in this regard, but the record affirmatively shows that the sources relied on by WIP indeed had past records of reliability (293a-294a).

First, the characterization of the magazine as obscene came to WIP from Captain Ferguson, a 48 year veteran of the Philadelphia Police Force, who had participated in investigating alleged obscenity law violations for more than 40 years, and, according to Rosenbloom's description of Nate Wright's conversation, from the District Attorney.[22]

WIP, over the years, had frequently relied on Captain Ferguson as a source and had found him reliable, as had other Philadelphia news media. The arrests here involved

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22. WIP had no reason to question the information received from Ferguson and the District Attorney, even assuming that these two sources presented only one side of the problem. As the Court of Appeals for the Fifth Circuit stated in **New York Times v. Connor**, 365 F. 2d 567, 576 (1966):

> "* * * a reporter without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution * * *."

Although, on cross-examination, Captain Ferguson's views on obscenity law were revealed to be relatively unsophisticated, WIP could hardly be charged with knowledge of this at the time Ferguson made his reports to the station.

were authorized by the Police Commissioner and Captain Ferguson was authorized by the Police Commissioner to issue releases to the news media (259a, 262a). In this very matter, the Philadelphia Bulletin, the Philadelphia Inquirer, WCAU-TV and the wire services had already used the same information from Ferguson with respect to Rosenbloom. It is difficult to imagine how WIP's reliance on Ferguson in this case could be characterized as "reckless disregard" or even as proof of an inadequate investigation.

Paul Rust, WIP's news manager, was unable to identify the actual source of the first broadcast in the second series, which took place almost five years before the trial. He testified that the station usually checked with the District Attorney's office on legal proceedings and, in fact, a check was made as to one broadcast with the judge in charge of the case. Beyond this, the record shows, as stated above, that WIP relied on Captain Ferguson and the District Attorney, either of whom would presumably be more qualified to investigate the legal nature of the publications than a newspaper or radio station would be. The record in no way supports the conclusion that WIP acted with "reckless disregard of the truth by failure to investigate" or even deviated from a reasonable newspaperman's standard of care. The burden of proof with respect to "actual malice" is, of course, on the plaintiff. **New York Times**, at 284.

The Court of Appeals rejected the trial court's conclusion that the "inflammatory" language of WIP's second series of broadcasts provided an intrinsic proof of reckless disregard of the truth. The Court in the **New York Times** case did not consider the charges there involved, which were at least as "inflammatory" as the ones in the present case, as evidence of actual malice or reckless disregard of the truth. See **Garrison v. Louisiana**, 379 U. S. at 74; **Washington Post Co. v. Keough**, 365 F. 2d 965, 970 (D. C. Cir. 1966). Rosenbloom's lawsuit was characterized by WIP

as being an action to enjoin law enforcement officers from arresting and prosecuting Rosenbloom, and to enjoin the defendant news media from characterizing the magazine as "smut and obscenity." In capsulizing the report of the lawsuit for a brief broadcast, WIP summed it up as a suit ordering the defendants "to lay off the smut literature racket." Accepting the known view of the Police Department and of the District Attorney, and in the light of the allegation in Rosenbloom's complaint (406a-407a), this was, in essence, a not unreasonable interpretation of the purpose of the lawsuit couched in non-legal language. Even at common law press reports of official or legal proceedings are normally not overly proscribed.[23]

In evaluating WIP's investigatory duty, it is important to note that the station was presenting fast-breaking news stories. In this context, it is hard to imagine how WIP realistically could be expected to make the kind of investigation which petitioner suggests. To permit a finding of actual malice on this record would substantially impede the ability of radio stations to perform a vital function in the broadcasting of "hot news."

Although, as petitioner points out, WIP did not broadcast a news report concerning Rosenbloom's lawsuit until the day of the first hearing, five days after the complaint was filed, there is no indication that WIP was aware of the story from the moment the complaint was filed in the District Court, or that it was worthy of any real interest, at least to laymen, before court proceedings commenced. In any event, WIP's references to the lawsuit, like all its

23. "Mere exaggeration, slight irony, or wit, or all those delightful touches of style which go to make an article readable, do not push beyond the limitations of fair comment. Facts do not cease to be facts because they are mixed with the fair and expectant comment of the story teller, who adds to the recital a little touch by his piquant pen." **Briarcliff L. Hotel v. C.-S.-Publishers**, 260 N. Y. 106, 118 (1932), 183 N. E. 193, 198, reargument den., 261 N. Y. 537, 185 N. E. 728.

arrest references to Rosenbloom, were part of newscasts ranging from 90 seconds to 10 minutes in length, and which contained as many as 18 separate items (350a-401a). In these circumstances, extensive investigation of a single news item—for example, by obtaining and subjecting to legal analysis magazines and court records—is impractical; it would be a great deal easier for the station simply to omit the story from the newscast, thereby depriving the public of access to the news. This case is nothing like the situation in, *e.g.*, **Butts**, where a lengthy feature article which required months of preparation was involved.

Rosenbloom now argues that the Court of Appeals erred in concluding that his evidence of "actual malice," even if inadequate considered *seriatim*, did not in total provide support for the jury verdict. The Court of Appeals properly evaluated the evidence separately to determine the constitutional sufficiency of each item, following the example set in **New York Times.** 376 U. S. at 286-292. In **St. Amant v. Thompson**, plaintiff maintained the defendant had published with no personal knowledge of the facts; relied solely on the affidavit of a source whose veracity was undisclosed by the record; failed to verify with individuals who might have known the facts; proceeded regardless of whether the published statements were defamatory, without considering the consequences; and published believing that there would be no responsibility for the broadcast because it merely restated the views of the source. The Court there held that a jury finding of actual malice could not be supported on the record.

In light of proper analysis of the facts and the controlling constitutional requirements, it is submitted that there is no evidence establishing the requisite "convincing clarity" that WIP acted with reckless disregard of the truth, and the Court of Appeals' holding should be affirmed.

CONCLUSION.

For the reasons set forth above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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May 8, 1970.